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SUPREME COURT, U.S.

No. 98-548

In The

Supreme Court of the United States

October Term, 1998

STEPHANIE PARKER-WEAVER, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Mississippi

MOTION TO AFFIRM

MIKE MOORE
Attorney General

*ROBERT E. SANDERS
Assistant Attorney General

SANDRA M. SHELSON
Assistant Attorney General

Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3815

Counsel For Appellees

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ISSUES PRESENTED

The simple issue presented by this appeal is whether the ordinary, and well established, rules of standing apply to a Section 5 Voting Rights Act case, or, whether instead, some special, and lesser, test of standing should be devised and applied to such cases. The District Court applied the criteria fashioned by this Court to determine Article III standing, and determined that the plaintiffs did not have standing to prosecute this Section 5 action. On appeal the plaintiffs essentially argue that in Section 5 cases any registered voter, whether or not he is directly affected by a particular voting change, has standing to mount a Section 5 challenge. The plaintiffs contend that this is so even without meeting the normal standing requirement of actual or imminent injury. If, as the District Court found, the ordinary elements of standing apply in Voting Rights Act cases this Court should summarily affirm the district court's judgment. Probable jurisdiction should be noted only if the Court wishes to create a different test for determining standing in Voting Rights Act cases, or if the Court wishes to overrule the many cases addressing standing and change the elements necessary for establishing standing generally.

PARTIES TO PROCEEDINGS BELOW

(1) Stephanie Parker-Weaver, Rims Barber, Erik Fleming, David Ingebretsen, and Ali Shamsid-Deen, Appellants herein.

(2) Kirk Fordice, Governor of Mississippi, Mike Moore, Attorney General of Mississippi, City of Jackson, Mississippi, and Terry Stone, former City Attorney for Jackson, Mississippi, Appellees herein.

(3) The plaintiffs list Terry Wallace, the present City Attorney for Jackson, Mississippi as a party. The Complaint itself lists Terry Stone, the former City Attorney, as defendant. No order was ever entered substituting Terry Wallace for Terry Stone.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move this Court to summarily affirm the judgment of the District Court. The questions sought to be raised by the Appellants are so insubstantial that full review is unnecessary. The District Court's decision presents no conflict or issue of statutory or constitutional interpretation that requires resolution by this Court.

STATEMENT OF THE CASE

A. Facts

The District Court dismissed the Complaint below on a Fed. R. Civ. P. 12(b) motion based on the plaintiffs' lack of standing. Accordingly, the "facts" set out in this brief are those pleaded in the Complaint.

In 1995, the Mississippi legislature enacted the Business Improvement District Act, Miss. Code Ann. §21-43-101, *et seq.* The legislation was modeled on similar laws that are common in other jurisdictions. The statutes merely allow like minded property owners in, and residents of, a contiguous geographic area to form an association and levy assessments against themselves based on the amount of property they own. Money raised by assessments may be used for various purposes which the members of the district perceive will improve the area. The funds may be used for matters ranging from landscaping to enhanced security or trash pickups. To the extent the members choose to direct funds toward enhancing services which are normally performed by city

government, those extra services are supplementary only. The city continues to provide its usual services in its usual manner.

The enabling legislation was needed only because city governments have a limited role to perform in the Business Improvement District (BID) construct. City governments have two functions with regard to BIDs. First, the assessments chosen by the BID members are collected by the city through its usual tax collection mechanisms. Second, the city helps conduct the initial BID election which determines whether the BID will be formed. The fact that the city has a role in BID elections is what prompts the plaintiffs' contention that Voting Rights Act requirements apply to the BID process.

In reality, BID elections are not political elections which determine political control of a governmental body. In short, they are not political elections within the ambit of the Voting Rights Act. Eligibility to vote in BID elections is determined solely by property ownership or residence within the proposed BID. Citizenship is irrelevant. It is also irrelevant that an individual may be a registered voter for political elections. The property owner may be a corporation or an alien, or both. The election itself is conducted by mail. There are no polling booths or other indicia of a normal political election. The role played by the city is merely the role of an honest broker for purposes of receiving and counting votes.

The plaintiffs do not allege in the Complaint, and do not otherwise contend, that any one of them is a property owner or resident of any existing or proposed BID. None even alleges property ownership at all. They allege

merely that they are registered voters (for purposes of normal political elections). None of the plaintiffs has alleged any particular injury to himself by reason of the fact that the BID enabling statutes were never submitted for Section 5 preclearance. There are two sets of defendants. Fordice and Moore are the State defendants representing the State of Mississippi. Stone and the City of Jackson are the local defendants representing the City of Jackson.

There has been one actual BID established in Jackson, Mississippi. It was established in 1996. No Section 5 submission was made in conjunction with the election for that BID, and the plaintiffs complain of that fact also. As with the enabling statutes, the plaintiffs have made no allegation regarding particular injury to themselves regarding the Jackson BID election.

B. Proceedings In The District Court

The Complaint was filed on September 4, 1997. A three-judge District Court was empaneled on October 14, 1997. The State defendants filed their Motion To Dismiss, Or, In The Alternative, For Summary Judgment circa February 7, 1998. The defendants' motion argued that the plaintiffs were without standing to prosecute this action, and that BID elections were not, in any event, within the coverage of Section 5 of the Voting Rights Act. On July 2, 1998, the District Court entered its Judgment dismissing the Complaint for want of standing. The plaintiffs filed their Notice of Appeal on July 31, 1998.

ARGUMENT

A. The District Court Correctly Determined That The Plaintiffs Were Without Standing

The District Court correctly applied the test used by this Court to determine standing as set forth in *Valley Forge Christian College vs. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982); *Lujan vs. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); and *United States vs. Hays*, 515 U.S. 737, 743 (1995). The District Court set out the rule, as quoted from *Hays*, at 742-43, as follows:

> It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

The District Court correctly noted that none of the plaintiffs claims to be a property owner or resident of an existing or proposed BID. Accordingly, the District Court concluded that, whether or not the matters in question are subject to Section 5, and whether or not a Section 5 violation actually exists, the plaintiffs do not have standing to raise the issue. The plaintiffs position, essentially, is that if they do not raise the issue it might not be raised

by anyone else. The plaintiffs' argument is little more than a claim of standing by default.

The plaintiffs' only rationale for the existence of standing is that they are registered voters of the City of Jackson and they perceive that a Section 5 violation exists. They argue that even though the BID statutes and the formation of the BID in Jackson have not personally affected them, they are automatically entitled to prosecute Section 5 cases relating to BIDs simply because they have taken the trouble to register to vote. The District Court pointed out that the plaintiffs' failure to allege any specific or particularized injury to themselves precludes a finding that the plaintiffs have standing. (App. to J.D., p. 9a)

In their Jurisdictional Statement the plaintiffs argue that potential harm is the hallmark of Section 5 actions, and that, accordingly, the possibility that one of them might someday be harmed in some way is enough to confer standing. The plaintiffs' argument confuses the two very separate concepts of Section 5 coverage on the one hand, and standing on the other. It is correct that voting rights cases are concerned with potential, as well as actual, harm. In covered jurisdictions, it is well settled that where any change in any standard, practice, or procedure carries with it the potential for a change relating to voting, Section 5 coverage attaches. Voting rights cases do not, however, hold that standing attaches to a particular person whenever there is merely the potential that the particular person will suffer injury by reason of a particular change.

The plaintiffs offer the example of *Perkins vs. Matthews*, 400 U.S. 379, 388-89 (1971), in support of their argument. In *Perkins* it was held that minority voters living within a city were proper plaintiffs to challenge an annexation even though none of the plaintiffs lived within the annexed territory. The plaintiffs reason that this is analogous to their situation of not living within an existing or proposed BID. In *Perkins*, however, minority voters living in the pre-existing municipal boundary could clearly, and concretely, have the power of their votes diluted by the addition of predominantly white voters to the composition of the city electorate. In contrast here, the plaintiffs will not be affected in any manner by the existing BID or any proposed BID. BIDs have no effect whatsoever on the composition of the city electorate, and no effect whatsoever on any other aspect of city elections or city services. The plaintiffs' recitation of *Perkins* is merely another example of, as the District Court put it, the plaintiffs' "position that, for §5 standing, all that is necessary is to allege a violation." (App. to J.S., p. 7a)

The plaintiffs point repeatedly to instructions in voting rights cases that the Voting Rights Act is to be liberally construed so that the objectives of the Act can be best realized. None of those cases, however, does anything to lessen the basic test of Article III standing. The District Court correctly refused to read into the Voting Rights Act any lower threshold for determining the core element of standing. The plaintiffs have demonstrated nothing more than a generalized interest in matters relating to voting. This Court should summarily affirm the District Court's ruling.

B. Neither The Mississippi Statutes Nor The Application Of Those Statutes Is Covered By Section 5

The District Court's dismissal of the Complaint should be upheld, or, alternatively, the Plaintiffs' suggestion of probable jurisdiction should be denied, for another reason as well. The matters which are the subject of this action simply are not within the coverage of Section 5 of the Voting Rights Act.

It is important to note that nothing in §21-43-101, *et seq.* in any way affects anything contained in the Mississippi Election Code, Miss. Code Ann. §23-15-1, *et seq.* The provisions of §21-43-101, *et seq.* do not effect any change in any statutory provision for voter registration, candidate qualification, the composition of any existing electorate, or the time or manner of election for any office or any issue relating to any political subdivision of the State. The elections contemplated by §21-43-101, *et seq.* have nothing to do with governmental policy, the formation of governmental policy, or the administration of governmental policy.

The plaintiffs' theory is nothing more than the notion that elections created or conducted *by* governmental authority somehow equate to elections *about* governmental authority. The plaintiffs offer no authority in support of this view. The simple fact is that the State may create, and in this case has created, an electoral process that has nothing to do with public governance on any level. Accordingly, neither the enabling legislation nor the actual creation and conduct of a BID is covered by Section 5. The municipal participation in BID elections is

nothing more than the insertion of an honest broker into the BID process as a matter of facilitation. Governmental services at all levels are commonly directed to assist private undertakings ranging from boosting tourism to forming neighborhood watch organizations, but the businesses or organizations which benefit from such activities do not thereby lose their status as private undertakings. Similarly, the mere fact that municipalities are directed by the Act to assist BIDs in achieving their goals does nothing to change the private nature and purpose of any BIDs. Elections under §21-43-101, *et seq.* are as essentially private as any elections conducted by any other private organizations. The plaintiffs' theory that a BID is a "public entity" is simply incorrect.

It seems too fundamental for dispute that the electoral process protected by the Voting Rights Act is the electoral process relating to political and policy control of government. The precept is so fundamental that it is not expressly stated in the Act, the regulations comprising the administrative procedures for the Act, or the cases interpreting the various provision of the Act. Section 14(c)(1) of the Act, 42 U.S.C. §1973L(c)(1), sets forth that the "terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election . . . with respect to candidates *for public or party office and propositions* for which votes are received in an election." (emphasis added) The voting which takes place in association with BIDs simply is not concerned with public office or public propositions, and is not, by definition, within the reach of the Act.

Section 14(c)(2) of the Act, 42 U.S.C. §1973L(c)(2), defines the term "political subdivision" of a State to

include any county, parish, "or other subdivision of a State which conducts registration for voting." This term was interpreted broadly in *U.S. vs. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 118 (1978) to include "all entities having power over any aspect of the electoral process . . . " The term "electoral process" was not defined, but it clearly refers to elections relating to direct political or policy control of government.

The issue of whether elections created or conducted *by* governmental authority are necessarily *about* governmental authority, or are otherwise concerned with the requisite "electoral process", is informed somewhat by reference to the regulations governing administration of Section 5. The potential for Section 5 coverage for actions of political parties is covered by 28 C.F.R. §51.7. The section provides that actions of political parties may be covered by Section 5 "(a) If the change relates to a public electoral function of the party, and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction . . . " Here, the BID is clearly acting under authority granted by a covered jurisdiction, the State, but the requirement of a relation to a public electoral function is absent. The defendants are not aware of any other statutory or regulatory provision which purports to extend Section 5 coverage to an entity which is not a political subdivision of a covered jurisdiction. To the extent §51.7 amounts to rule for assessing coverage for entities that are not political subdivisions of a covered jurisdiction, the actions challenged are clearly not covered by the Act.

This Court and lower courts have had occasion to examine the governmental nature of special purpose districts before. *see, Ball vs. James*, 451 U.S. 355 (1981); *Salyer vs. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); and *Kessler vs. Grand Central District Management Ass'n*, 960 F.Supp. 760 (S.D.N.Y. 1997). The cases generally hold that, at least for purposes of one man one vote analysis, the functions of special purpose districts are so limited that the districts do not qualify as true governmental units. If the function of such bodies is not sufficiently governmental to bring those bodies within the reach of one man one vote requirements, then elections for such bodies can not be sufficiently political to bring those elections within the reach of Section 5. For the same reason, the adoption of the enabling legislation is not covered by Section 5.

The *Kessler* case is particularly instructive. *Kessler* involved a BID functionally indistinguishable from BIDs which may be created in Mississippi. The *Kessler* court held that the BID's authority to make assessments against property in the district is not equivalent to the power to levy taxes, and is not, therefore, an indication of governmental power. *supra*, at 773, and fn. 15. The power to make assessments is the same for Mississippi BIDs under Miss. Code Ann. §21-43-123(1). The court held that even though some of the services which BIDs can provide may overlap with core governmental services such as security or sanitation, the provision of these services is secondary, and supplemental, to the primary provision of these services by the city. *id.*, at 774.

The defendants do not dispute, of course, that some special or limited governmental units such as school

districts or water districts routinely submit electoral changes for Section 5 preclearance. These limited rule districts administer the provision of *essential* services normally provided by government. The fact that smaller governmental subunits are created is simply a matter of perceived efficiency. There is no issue regarding the governmental nature of the services they provide. BIDs, on the other hand, merely administer programs which the property owners deem *desirable*. The usual governmental entities continue to administer essential governmental functions within the BID geographic area. The provision of these essential governmental services to anyone who happens to live within a BID are not affected by the existence of a BID, or by anything a BID may choose to do or not do. To the extent a BID might choose to provide services which enhance the basic provision of services by the government, such additional effort is, as stated in *Kessler*, merely supplementary. The fact that other limited purpose districts having qualitatively different functions may be covered by Section 5 does not change the private nature of BID activities, and does not advance the proposition that the present State legislation or BIDs are covered by Section 5.

CONCLUSION

The District Court was correct to apply the standing test fashioned by this Court. The plaintiffs offer no rationale for the application of any other test. The District Court's judgment should be affirmed for this reason. Alternatively, the judgment should be affirmed because the matters complained of herein are not within the coverage of Section 5 of the Voting Rights Act.

Respectfully submitted,

MIKE MOORE
Attorney General

*ROBERT E. SANDERS
Assistant Attorney General

SANDRA M. SHELSON
Assistant Attorney General

Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3815

Counsel for Appellee

**Counsel of Record*